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In the Supreme Court of the United States

OCTOBER TERM, 1995

JEFFREY B. CARR,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Can A Criminal Statute Constitutionally Prohibit The Manufacture, Sale and Distribution of A Product Which By Its Design Can Only Be Used For A Legal Purpose If The Defendant Can Reasonably Anticipate That The Ultimate Consumer Will Alter The Product So That Its Primary Purpose Will Be Illegal?

LIST OF PARTIES

The parties to this case are the petitioner, Jeffrey B. Carr and the United States of America as respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeffrey B. Carr, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on December 5, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated October 10, 1995 is reprinted in the appendix together with the judgment denying rehearing dated November 27, 1995.

JURISDICTION

The Court of Appeals' judgment (mandate) was entered on December 5, 1995. Petitioner now invokes the jurisdiction of this court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments XIV to the United States Constitution and 47 U.S.C. §605(e)(4) are set forth in the appendix.

STATEMENT OF THE CASE

A. *Statement of Proceedings Below*

On July 1, 1994, defendant-appellant Jeffrey B. Carr was indicted with three co-defendants in the Eastern District of Louisiana for alleged violations of 47 U.S.C. § 605 (e)(4).

More particularly Mr. Carr was charged in Count I together with a William Hunter, Michael Hunter and Ronald MacDonald alleging conspiracy to violate 47 U.S.C. § 605 (e)(4). The defendants were charged with conspiring to manufacture, sell and distribute electronic devices which were primarily of assistance in the unauthorized decryption of satellite cable programming. Further, Mr. Carr was charged in counts 4, 5, 6 and 7 with the substantive Counts of actually distributing and assisting in the distribution of 67 specific devices that allegedly were primarily of assistance in the unauthorized decryption of satellite cable programming. Vol. I, pp. 240-245. The defendant Carr appeared and posted bail, was arraigned and entered a plea of not guilty as to all counts related to him. *Ibid.* 203. The other co-defendants were Canadian citizens and they failed to appear for indictment and as of this date have not been apprehended. *Ibid.* 182-190. Defendant Carr filed numerous pre-trial discovery motions, *Ibid.* 134-181, which in due course were answered by the government, *Ibid.* 130-133, and ruled upon by the magistrate, Ibid. 107-108.

Thereafter, defendant Carr filed a motion to dismiss the indictment pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure on the ground that the statute under which he was charged was unconstitutionally vague and overly broad. *Ibid.* 86-101. The district court denied that motion. *Ibid.* 75-77. The case proceeded to trial before the Honorable Edith B. Clement on November 14, 1994. After presenting its evidence for three days the government rested on November 16, 1994 and the defendant moved for a verdict of dismissal as to all counts, which motion the Court took under advisement. *Ibid.* p. 1. The defendant presented evidence and at the conclusion of all of the testimony he again

moved for a verdict of dismissal, which motion was denied. Vol. II, p. 340. The defendant Carr filed a request for a special jury instruction to the effect that the language in the statue prohibiting the manufacturer from selling and distributing the electronic devices which were "primarily of assistance in the unauthorized decryption of satellite cable programming", meant primarily of assistance "as designed". The court declined to read any design criterion into the statute and refused to give the requested instruction. The jury returned a verdict of guilty as to all counts relative to the defendant Carr. *Ibid.*

On February 8, 1995, the defendant was sentenced to the custody of the Bureau of Prisons for a term of 40 months concurrently, as to Counts 1, 4, 5, 6, and 7 of the indictment and ordered to pay a $30,000.00 fine. *Ibid.* pp. 310-311.The defendant Carr filed a notice of appeal challenging both the conviction and the sentence, *Ibid.* p. 305.

B. *Statement of Facts*

In 1992, and some years prior thereto, General Instruments, Inc. had a monopoly for supplying descrambling devices for satellite decryption. Pay T.V. channels such as HBO, Cinemax, Disney, etc. in order to get paid for their copyrighted entertainment would have their satellite television signals "scrambled" and in order to see the program the viewer would have to buy a descrambling device from General Instruments known as a Video Cipher II (VC-II). Vol. VI, pp. 161-162. Those persons who paid for the programs would have the signals descrambled by the VC-II device which was placed on top of their television, and theoretically those who did not pay could not watch those channels.

General Instruments was, to put it kindly, less than successful with its monopoly. Vol. VI. pp. 162-165. That is because satellite pirates known as "hackers" kept figuring out ways to modify the VC-IIs so that the viewer could receive the unscrambled signals without having to pay for them. *Id.*

To solve this problem General Instruments announced in 1991 that during 1992 it was going to solve all of the satellite piracy problems by coming out with a completely new device, called the Video Cipher II Plus (VC-II Plus) which would descramble an entirely different "data stream" from the satellites thereby making the VC-II devices obsolete. Vol. VI, pp. 164-166; Vol. V, p. 720; Record Excerpts, Def. Exh. No. 1. Obviously the persons who had bought the original descrambling devices did not want to pay hundrds of dollars more to buy a new device and General Instruments offered what was ostensibly a very fair arrangement. It announced that it would replace the VC-IIs with the VC-II Pluses at no charge to the customer *provided* that the VC-II had not been modified. Vol. V, p. 720; Vol. V I, pp. 166-167; Vol. IV, p. 619; Record Excerpts, Def. Exh. No. 1. Of course, almost all of them had been modified and General Instruments well understood that. Out of the approximate 1.8 million which it had sold it only had to replace approximately 250,000. Vol. IV, pp. 621-622; Vol.VI, pp. 196-197, 201; Vol. V. pp. 719-721. This meant that approximately 1.5 million VC-IIs for which people had paid hundreds of dollars would be rendered useless when General Instruments shut down the data stream in 1992.

The VC-IIs were in essence small computers that had the capability of performing many functions other than descrambling satellite signals. Mr. Jerry McCarter, a school

teacher from Red Boiling Springs, Tennessee, had for a number of years worked part time as a television satellite distributor and he saw a "window in time" during which it would be possible to tap into that market of 1.5 million households. Vol. IV, pp. 615-622; Vol. V, p. 730. Mr. McCarter was friends with the defendant Jeff Carr who had extensive experience with computer software. Vol. IV, p. 616; Vol. V, pp. 714-718. They discussed the feasibility of using the obsolete VC-II computers and attaching a device to them that would allow them to receive and send text material between a host computer and the various television sets that would be having the obsolete VC-IIs replaced by the VC-II Pluses. Vol. IV, pp.622-626; Vol. V, pp. 716-721. Recent developments in computer technology had allowed computer operators to communicate or "interface". Mr. McCarter's concept was to allow the person who was not computer literate, indeed did not even have a computer, to interface with a computer through his television set, using only the digital device on the television's remote control. Vol. IV, pp. 622-625; Vol. V, pp. 716-721. While Mr. Carr was knowledgeable about computer software he was not capable of actually designing or building the hardware unit that would allow the VC-IIs to be so converted. Vol., IV, p. 626. Mr. Carter was put in touch with Jeff Mayes who did have that expertise and the three of them formed Video Marketing Services, Inc. (VMS) which they incorporated in September of 1992. Vol. IV, p. 626; Vol. V, pp. 724-725.

They were in fact successful in developing exactly the device which they had envisioned. Vol. IV, pp. 622-628. When used in conjunction with the obsolete VC-IIs the VMS device would allow the television viewer to receive any type of text information on his screen. Vol. IV, pp. 628-632; Vol V, pp.

724-730; Vol. V, pp. 856-857. While the VMS devices worked through telephone lines and had nothing to do with satellites signals the success of their venture was tied integrally to satellite dealers. Vol. IV, p. 632; Vol. V, pp. 728-730. First, it would be the satellite dealers in the various communities who would know what households had the obsolete VC-II units. That is because it was the satellite dealers who would be selling the new VC-II Pluses (and in all likelihood had sold many of the original VC-IIs). In other words, when General Instruments shut down the data stream making the VC-IIs obsolete those customers who could not get free VC-II Pluses, because they had modified their VC-IIs, would have no choice but to call a satellite dealer to buy the replacement unit. When selling the new unit it would be a natural for the dealer to explain to the customer how he could buy the VMS device for a small price which would allow him to interface with a host computer. Also, it would be the satellite dealers who would supply the local host computer. That computer would in turn be connected to the national computer which would be controlled by VMS. To become a local distributor for the VMS product the satellite dealer would have to agree to give a certain number of free pages of text for VMS's national advertisers. Vol. V, pp. 728-730; Vol. IV, pp. 631-633.

Th VMS principals had no illusions that they had the facilities and resources to make T.V. internetting a nationwide reality. On the other hand, they did see the ability to exploit the availability of over 1.5 million VC-II computers which would allow them to get a "foot in the door" very inexpensively. They felt that once they had proved the feasibility of the process, even on a small scale, that one of the larger communication companies would be willing to buy them out

at a substantial profit.

The concept appeared to be foolproof and would have been but for the fact that General Instruments did not follow through on its announced intention to completely shut down the data stream and replace it with an entirely new signal. It did so for all of the individual users, but the logistics and expense of making the change over for commercial users, e.g. cable companies, hotels, etc., proved to be insurmountable, and therefore the data streams to commercial users remained exactly the same. As long as that data stream was still available the VC-IIs were not in fact completely obsolete. General Instruments sought to thwart the individual from picking up the commercial data stream by having it tied in to a complex and ever changing series of signals that it was envisioned would be too difficult for the home user to constantly adjust. On the other hand, it was feasible for the commercial users to make the necessary adjustments of the so called "wizard code" by means of computers. Therefore when the hackers stole the wizard codes, as it was inevitable that they eventually would, General Instruments thought they would be useless to the individual user. However, many satellite dealers had host computers through which the wizard codes could be utilized. Therefore the hackers who stole the wizard codes would sell them through their computer "bulletin boards" and the satellite dealers who hooked into the bulletin boards would use their host computers to disseminate the information to their customers. Vol., VI, pp. 202-205; Vol. V, pp. 736-741. (See also, Record Excerpts, Def. Exh. No. 5).

Mr. Carr, Mr. McCarter and Mr. Mayes recognized the potential for the VMS devices which they were selling to be

misusesd. The local satellite dealers could use their host computers for receiving and transmitting the wizard codes instead of, or in addition to, the delivery of text, and if the software in the VMS devices was changed then the obsolete VC-IIs could once again be used for the illegal decryption of satellite signals.

Recognizing that the VMS devices had the potential to be altered and misused Mr. McCarter sought legal advice as to whether he and the others at VMS would be violating any laws by manufacturing and selling the VMS devices. Legal counsel assured Mr. McCarter that as long as the VMS device as designed, manufactured, and sold by them was for a legal purpose they would not be violating any laws simply because they could reasonably anticipate that others might alter and misuse the product. Recognizing that the possible illegal use of the product would require the combined knowledge and efforts of the satellite dealer as well as the ultimate user legal counsel prepared for Mr. McCarter a warnings provision to go into the contract with the distributor pointing out the legitimate use of the product and that it could be a violation of law to use it in any other manner. The warnings were also printed and sealed on the VMS devices themselves so that anyone changing the software would have to break the seal, thereby voiding the warranty. All of the precautions suggested by legal counsel were implemented by VMS. Vol. IV, pp. 633-636; Vol. V, pp. 732-733.

Further, when Mr. McCarter saw that there was an advertisement in an underground magazine called Satellite Watch - basically a publication for hackers - by one of VMSs distributors, Ronald MacDonald, touting the potential of VMS devices to be used for satellite descrambling he immediate-

ly ceased to sell any more products to Mr. MacDonald. However, Mr. MacDonald was able to reverse engineer what Mr. Carr and Mr. Mayes had done and he continued to manufacture and sell his own devices out of Canada for illegal purposes. He advertized his device as being "VMS", but in very small print underneath his ad he called it Video Modem Services instead of Video Marketing Services. Vol. V, pp. 749-751. (See also, Record Excerpts, Def. Exh. No. 5).

For the VMS devices to be used effectively for text delivery in conjunction with the obsolete VC-II's there was an electronic device which they sold called a "Text Mate" that connected the VMS device to the VC-II and by simply hitting a button on the television's remote control the viewer could switch back and forth between watching television and receiving the text delivery. If the ultimate user was going to alter the VMS device to use it illegally for satellite decryption there would be no need for the Text Mate. While many of the Text Mate devices were sold by VMS to its distributors the number of orders for the VMS devices more than doubled the orders for the Text Mates. It logically followed that the principals at VMS had to realize that the "primary" purpose for which the VMS devices were being used was for illegal satellite decryption. Vol. IV, pp. 633-636; Vol. V, pp. 732-751.

General Instruments was understandably upset with its latest failure and working in conjunction with Special Agent Richard Coleman of the United States Customs Service they set up an undercover operation in which Agent Coleman posed as a satellite pirate, named Richard Collins. Vol. IV, p. 532. In that capacity he purchased some VMS devices from one of the company's distributors, Mr. Dana Lafever.

However, the devices as delivered by VMS to Mr. Lafever were not capable of intercepting satellite signals and were only capable of delivering text through telephone lines. Believing that the text delivery system was merely a front to alow the company to sell illegal satellite descramblers Agent Coleman contacted VMS and posing as Collins spoke with Jeffrey Carr and secretly recorded their conversation. Mr. Carr told him that he could not sell him VMS devices as they only sold through distributors and the VMS devices were designed for delivery of text. Agent Coleman again working in undercover capacity happened to meet Mr. Carr at a convention in Nashvilloe, Tennessee, at the hotel room of Dana Lafever. Agent Coleman surreptitiously recorded that conversation and once again Mr. Carr emphasized that their system was designed for text delivery. Vol. III, pp. 318-323.

Nevertheless, Agent Coleman and the personnel at General Instruments with whom he was working continued to believe that the VMS operation was simply a front to sell illegal descramblers and therefore they concocted an elaborate scheme to prove that VMS was in fact "dirty".[1] Agent Coleman claimed to have been working with other hackers who had come up with a method of "cloning" the VC-II Plus. While the concept was electronically very complicated the experts at trial explained that each VC-II Plus unit had an identifying "finger print" that was unique to it. This secret code, which was also described as something like individual social security numbers, would allow the VC-II Plus to receive descrambled signals from the new data stream being sent by satellite. If in fact a hacker had been able to

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[1] The sting operation was not limited to VMS as there were others who were being targeted, but it was conceded that VMS was certainly a prime target.

reverse engineer the General Instrument software and break that code then the VC-II Pluses would be doomed. Vol. V, pp. 782-789.

Agent Coleman playing the part of a crooked satellite pirate was offering to put on a showing of the cloned unit in New Orleans and insisted that anyone wishing to see the demonstration had to be ready to purchase the device for $50,000.00. Vol. IV, pp. 532-534. Neither Jeff Carr nor Jeff Mayes had any intention of purchasing the unit, but they were desperate to find out if any hacker had successfully cloned the VC-II Plus. Therefore, since Agent Coleman acting in his undercover capacity made it clear that he would only deal with satellite pirates Mr. Mayes and Mr. Carr pretended to be involved in such activity so that they could get an opportunity to view the demonstration. Of course, all of the conversations were surreptitiously recorded by Agent Coleman and while Mr. Carr did play the part of a hacker in order to see the demonstration that was the limit of his willingness to do so. After he had seen the demonstration and Agent Coleman continued to engage him in conversation regarding the VMS operation in an effort to get Mr. Carr to concede that it was in fact just a front to sell illegal descrambling equipment, Mr. Carr made it clear that that was not correct and that they did in fact have a legitimate operation. Dissatisfied with that response Agent Coleman then identified himself as being a Custom's agent and placed Mr. Carr under arrest. Vol. IV, pp. 464-511; Vol. V, pp. 785-798.

Two days after Mr. Carr was arrested Agent Coleman and numerous other agents of the United States Custom Service executed a search warrant at the VMS offices in Red Boiling Springs, Tennessee and seized all of the company's

records, computers, computer discs and electronic products and parts. Vol. IV, pp. 541-545. The search disclosed no devices, equipment, parts, or records relative to illegal satellite decryption.[2] Agent Coleman then began a series of interviews with various persons whom he was able to learn from the VMS records had purchased VMS devices. He found some persons who were using the product illegally and they were given immunity if they would give information against Jeff Carr. The record discloses that for the most part the witnesses simply concluded that Jeff Carr knew that they were using the product illegally because he assisted them on various occasions with technical help. However, the record also reflects that the assistance which Mr. Carr rendered to those individuals was entirely consistent with the VMS devices being used for legal text delivery. Vol. V, pp. 755-782. The specifics of that evidence is analyzed in the Appendix.

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[2] The agents did recover one piece of software that contained every possible use for the VMS equipment, both legal and illegal. However, the print out from the disc disclosed it to be not a record of VMS but rather a retrieval from a computer bulletin board. Mr. McCarter and Mr. Carr explained that when they accused Ron MacDonald of using their VMS devices for illegal purposes he at first denied doing so. They therefore secured access to his bulletin board and purchased everything that related to VMS devices. When they printed out that information it disclosed that he in fact was selling information on how to use the VMS devices for illegal decryption and that is when they quit doing business with him. Vol. IV, pp. 638-643; Vol. V, pp. 736-741.

REASONS FOR GRANTING THE WRIT

Can A Criminal Statute Constitutionally Prohibit The Manufacture, Sale and Distribution of A Product Which By Its Design Can Only Be Used For A Legal Purpose If The Defendant Can Reasonably Anticipate That The Ultimate Consumer Will Alter The Product So That Its Primary Purpose Will Be Illegal?

A. *Introduction*

As society becomes more complex and malefactors develop more sophisticated methods of victimizing citizens Congress and state legislatures seek to solve the problems, at least in part, by prohibiting the manufacture, sale, and distribution of various articles such as surreptitious listening devices, drug paraphernalia, automatic weapons, satellite decryption devices, etc. The constitutional challenge has been to draft the statutes so that they are not impermissibly vague and/or overly broad. In the *Hoffman Estates*[3] case this Court found that an ordinance banning the sale of drug paraphernalia was sufficiently precise because the articles being prohibited were tied to the objective criterion of design. The design factor was used in a number of statutes that were found to be constitutionally valid.[4] As Congress sought to sweep more broadly in its prohibitions it banned the use of

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[3] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)

[4] E.g. *Lanzetta v. New Jersey*, 306 U.S. 451, 454, n.3, 59 S.Ct. 618, n. 3, (1939); *United States v. Schweihs*, 569 F.2d 965 (5th Cir. 1978); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980); *United States v. Splawn*, 963 F.2d 295 (10th Cir. 1992).

mails or interstate transportation regarding any devices that were designed for use or were "primarily intended" for use in the consumption of illegal drugs. Last term in the *Posters 'N' Things* case[5] this Court upheld the constitutionally of the statute as applied. Pursuant to its prior decisions the court had no problem with the "designed for use" standard, but expressed some misgivings about the "primarily intended for use" criterion. The Court upheld the constitutionality of that language in that particular case because there was no question but that the defendants operated a "head shop" and the design of all of the items seized clearly disclosed that they were primarily intended for the consumption of illegal drugs. The Court left open for examination at a later date the question of multi-use items that had both legitimate and illegitimate functions.

With all deference to the Court's analysis in *Posters 'N' Things* the concurring opinion by Judge Sacalia demonstrates that more questions were raised than were answered by the exploration of the primarily intended language. Since all of the items at issue were designed for use in illegal drug consumption the need to have analyzed the alternate language was questionable.

In any event, the issue which was pretermitted in *Poster'N' things* is presented by petitioner in its purest and most far reaching form. In 47 U.S.C. § 605 (e)(4) Congress prohibited the manufacture, sale, or distribution of any device that was "primarily of assistance" in the illegal descrambling of satellite communications. The statute had

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[5] *Posters 'N' Things, Ltd., et al v. United States,* ___U.S.___, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994).

no design criterion, and when the defendant sought to have that standard read into the statute so as to make it sufficiently precise to be constitutional the trial court and appellate court rejected that interpretation. As the Court will see from the following analysis the result was that the defendant was prosecuted, convicted, and sentenced for manufacturing and selling a device that everyone - the prosecution, the trial court, and the appellate court - conceded was perfectly legitimate and which could *not* be used for satellite decryption, on the ground that the defendant knew that the primary purpose for which the device was ultimately being employed by the purchasers was to alter it, in contravention of clear warnings not to do so, and use it for satellite decryption.

This is the first time in the history of the Republic that any criminal statute has ever been read so broadly. While petitioner maintains that such a reading is unconstitutional the more troubling aspect of the case is that the court of appeals gave absolutely no consideration or analysis of this most far reaching issue. In this application the court is presented with the precise question that it left open for resolution in the *Posters 'N' Things* decision, and it is respectfully suggested that writs should be granted.

B. *Argument*

Petitioner Jeffrey B. Carr was convicted for violations of 47 USC § 605 (e) which makes it a crime to manufacture, sell, or distribute electronic devices and equipment knowing or having reason to know that the devices and equipment were "... primarily of assistance in the unauthorized decryption of satellite cable programming. . . ." At the trial level it was stipulated by the government that the devices as

manufactured and distributed by the defendant could *not* be used for the unauthorized decryption of satellite cable programming. To the contrary the devices could only be used for delivering text to television sets through telephone lines. However, if the ultimate purchaser changed the software in the VMS device it was then capable of illegal satellite decryption. The defendant admitted at trial that he knew that the majority of persons purchasing his product were altering it and using it illegally, although he contended that that was contrary to his instructions and desires. Regardless of his wishes it was clear from his testimony that the "primary" purpose for which his product was being used was for the illegal decryption of satellite signals. This case presents for consideration the specific issue left open by the Court in the case of *Posters 'N' Things, Ltd., et al v. United States,* ____U.S.____, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994).

In the *Posters 'N' Things* the Court was called upon to decide the constitutionality of the Anti-Drug Abuse Act of 1986, as amended, 21 U.S.C. §857(a)(1), (d). That statute defined prohibited drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use" with illegal drugs. This Court had no problem with the "designed . . . for use" standard pointing out that the ". . . objective characteristics of some items established that they are designed specifically for use with controlled substances." *Ibid.* at 1749. The Court went on to note that the "primarily intended . . for use" language of §857(d) "presents a more difficult problem." *Ibid.* 1750-1751. The Court stated: "We conclude that the term "primarily intended. . . for use' in §757(d) is to be understood objectively and refers generally to an items likely use." *Ibid.*

The opinion stated:

> Further, we do not think that the knowledge standard in this context requires knowledge on the defendant's part that a particular customer actually will use an item of drug paraphernalia with illegal drugs. *It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs.* Therefore, the government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs. *Ibid.* at 1753. (Emphasis added.)

The petitioners in *Posters 'N' Things*, supra, argued that §757 was unconstitutionally vague as applied to them in that particular case, but the court concluded, "Whatever its status as a general matter we cannot say that §857 is unconstitutionally vague as applied in this case." *Ibid.* 754[6]. However, this Court noted:

> Section 857's application to multiple-use items—such as scales, razor blades, and mirrors—may raise more serious concerns. Such items may be used for legitimate as well as illegitimate purposes, and "a certain degree of ambiguity necessarily surrounds their classification." Mishra, 979 F.2d, at 309.
>
> This case, however, does not implicate vagueness or other due process concerns with respect to such items. Petitioners operated a full-scale "head shop", a business devoted substantial-

[6] In *Posters 'N' Things* the items seized included bongs, scales, roach clips and drug diluents, items which exclusive use would be drug paraphernalia. *Ibid.* 1749.

> ly to the sale of products that clearly constituted drug paraphernalia. The Court stated in *Hoffman Estates:* "the terretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling stone magazine ... is of no due process significance unless the possibility ripens into a prosecution. "455 U.S., at 503-504, n.21, 102 C.Ct., at 1196, n. 21. Similarly here, we need not address the possible application of a §857 to a legitimate merchant engaging in the sale of only multiple-use items. *Ibid.* 1754-1755.

From the above analysis three things are clear. One, criminal responsibility can flow from a defendant's recognition that the public's use of the product which he is selling would likely be for an illegal purpose. Two, the specific items at issue in the *Posters 'N' Things* case were illegal as designed. Three, the Court left open for consideration the constsitutional issue of whether a statute could constitutionally prohibit the sale of an admittedly legitimate article if the seller could reasonably anticipate that it was likely that the ultimate user would misuse the product for an illegal purpose. That is the precise issue before the court in this application for writ.

Petitioner was convicted of one count of conspiracy to violate, and four substantive counts of violating. 47 U.S.C. § 605 (e)(4) which reads in pertinent part as follows;

> (e) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages, regulation by State and local authorities
>
> (4) Any person who manufactures, assembles,

> modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each graph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

The statute is silent as to what is meant by the language "primarily of assistance." It could mean primarily of assistance as designed, manufactured, and sold or it could mean the prime or main way the purchaser would be likely to use it. In the district court petitioner filed a motion to dismiss the indictment on the grounds that the statute was unconstitutionally vague and overly broad. That motion was denied. At the time of trial petitioner requested that the district court at least interpret the statute as meaning primarily of assistance for illegal decryption as "as designed"[7]. The district court declined to give any such instruc-

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[7] The specific language of the requested charge is as follows:

> The term "primarily of assistance" as used in the statute which I read to you means that the device "as designed" must render it primarily of assistance for the illegal intercept of encrypted satellite signals. A person who designs and distributes a device that is not primarily of assistance in illegal satellite interceptions does not violate the statute simply because he can reasonably anticipate that others might change the device so as to make it primarily of assistance in illegal interception.

tion to the jury and an objection was duly noted. The defendant testified at trial that he knew that notwithstanding his company's warnings and efforts to the contrary, the prime purpose for which the consumers were using the VMS device was to alter it by changing the software so it could illegally descramble satellite signals. With that admission, and no limiting instruction by the court, the jury of course had no option but to convict petitioner. He was ". . . aware that customers in general [were] likely to use . . ." the VMS product for the unauthorized decryption of satellite cable programming. That is exactly what the statute appears to say is prohibited.

Indeed, it was that very admission which sealed petitioner's fate in the appellate court. In its opinion the Fifth Circuit of Appeals acknowledged that, "[i]t is undisputed that the devices were designed to have text legally delivered through telephone lines and had to be modified before they could be used to illegally descramble the satellite signals." Even in the face of that acknowledgement the appellate court had no difficulty in affirming the defendant's conviction reasoning as follows:

> Here, however, the evidence overwhelmingly showed that Carr knew that the devices would be modified so that they could be used to illegally intercept signals. Indeed, Carr admitted his knowledge of the intended illegal activity during his testimony. It is Carr's criminal knowledge, *not* the criminal intent of the purchaser of the device, that violates § 605 (e)(4). *Ibid.* pp. 8-9.

Can a criminal statute constitutionally reach that far? Can a

citizen be criminally punished for manufacturing and selling what is admittedly a perfectly legitimate item because he can reasonably anticipate that most purchasers will alter the product to use it illegally? This is exactly the constitutional issue which this Court did not have to reach in the *Posters 'N' Things* case. Can a merchant be constitutionally prohibited from selling paper clips if he can reasonably anticipate that the prime purpose for which his customers will use them will be to alter them so that they can serve as clips for holding marijuana cigarettes? In his application for rehearing to the appellate court petitioner made the following observations:

> The Court seemed to be impressed with the fact that in this particular case the defendant did not have to "guess at his peril" whether purchasers were modifying the VMS devices to use them illegally because he admitted in his testimony that he knew that that was taking place. Therefore, the Court concluded that he had guilty knowledge. However, that over simplifies the issue. If that logic were adopted then General Instruments would also be guilty. The company's representative conceded in his testimony that they knew that most of the VC-II's were being modified by purchasers to be used illegally. Nov. 14, 1994, Norris pp. 161-163; 191-192; 203. In fact, it was estimated that about 1.5 million of them had been illegally modified and only about 250,000 were used legally. *Ibid.* 191-192.
>
> ***
>
> Obviously, the government is not going to prosecute General Instruments, but if the Court's logic were accepted there would be no reason why such a prosecution could not take place.

Application for Rehearing p. 12.

As long as General Instruments and the federal government are teaming up to shut down petitioner's little basement plant in Red Boiling Springs, Tennessee they are not concerned about constitutional issues of statutory vagueness or overbreadth. This Court should be. Wealthy and powerful corporate citizens are entitled to no greater constitutional protection than is the most humble citizen.

This Court has held that fundamental fairness as well as the concern for preventing the deterrence of constitutionally protected conduct requires that persons not be compelled to guess at their peril[8] the meaning and application of a criminal statute. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294 (1972) and *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618 (1939). Reasonable ascertainable standards of guilt are required in order to protect against arbitrary and discriminatory arrests and prosecutions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839 (1972) and *Winnters v. New York,* 333 U.S. 507, 68 S.Ct. 665 (1948).

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforce-

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[8] The petitioner did not have to "guess" whether his customers were modifying his product to use it illegally, but he did have to guess whether that knowledge would make his guilty of violating §605(e)(4).

> ment is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford,* supra, at 108, 2298.

The overbreadth doctrine protects against a statute making criminal, actions which are innocent or constitutionally protected. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908 (1973).

The Court will note that in all of the reported cases under §605 the devices in question had in fact been so that their *only* purpose would be to illegally decrypt satellite signals. E.g. *United States v. Harrell,* 983 F.2d 36 (5th Cir. 1993); *United States v. Splawn,* 963 F.2d 295 (10th Cir. 1992); *United States v. McNutt,* 908 F.2d 561 (10th Cir. 1990) cert. denied 498 U.S. 1084, 111 S.Ct. 955 (1991). Since the statute specifically prohibits modification of electronic devices for the purpose of descrambling satellite signals the courts in those cases were not challenged regarding the constitutionality of the wording of the statute.

Further the courts have allowed the government to prosecute illegal descramblers under both 47 U.S.C. §605(e)(4) and 18 U.S.C. §2512(1)(b), the surreptitious intercept statute. *United States v. Harrell,* supra; *United States v. McNutt,* supra; *United States v. Davis,* 978 F.2d 415 (8th Cir. 1992)(*en banc*); *United States v. Lande,* 968 F.2d 907 (9th Cir. 1992). Yet the government in the instant case did not choose to pro-

ceed under Title 18 even though the *Harrell* decision made it clear that it was permissible to employ both statutes in the same indictment. An analysis of the difference between the two statutes discloses why the Title 18 statute was not used in the instant case and why the Title 47 statute as interpreted by the lower courts is unconstitutional.

18 U.S.C. §2512(1)(b) makes it a crime to possess an electronic device knowing". . .that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications. . . ." It is the design characteristics that make the device illegal. *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489 U.S. 489, 102 S.Ct. 1186 (1982), *United States v. Schweihs,* supra. That is an objective criterion that saves the statute from any challenge of vagueness or overbreadth. The Fifth Circuit acknowledged on page 8 its opinion that petitioner Carr would not have been guilty had he been charged under §2512(1)(b).

> Carr's remaining arguments center on the fact that the device had to be modified before it could be used to illegally intercept the signals. Those arguments convince us that 18 U.S.C. §2512(1)(b) was not applicable to his conduct. Section 2512(1)(b) makes it a crime to possess an electronic device knowing "that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications. . . ." However, he was not convinced of violating §2512(1)(b); instead, he was convinced of violating 47 U.S.C. §605(e)(4). Accordingly, we find the arguments afford him no relief.

It is for that reason that the government sought to rely upon the language in 47 U.S.C. §605(e)(4) maintaining that the VMS equipment was "primarily of assistance" in the unauthorized decryption of satellite cable programming. However, that language is too vague and broad to withstand constitutional muster.

The defense recognizes the principle of statutory interpretation adopted by this Court that it will not declare a statute unconstitutional if it is possible to read into it a permissible meaning. The Court has repeatedly held, "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality. . . ." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988); *United States v. Monsanto*, 491 U.S. 600, 611, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989). It was because of that principle that the defendant submitted the special jury instruction requesting the district court to read into the statute the requirement that the device had to be "primarily of assistance" *as designed* so as to avoid the possibility that the defendant could be convicted simply because he knew that the primary use to which consumers would put his text delivery system would be to alter it for illegal interception of satellite signals. The district court declined to give that instruction and accordingly the defense could not argue to the jury that the devices had to be primarily useful for decryption as designed.

As previously noted this left the defendant vulnerable to being convicted by his own testimony without the jury ever having to reach the issue of conflicting testimony between prosecution and defense witnesses. Mr. Carr conceded in his

testimony that he knew that the VMS devices which were being sold by VMS were in all likelihood being altered and misused for decryption. With the sale of the Text-Mates lagging substantially behind the sale of the VMS devices[9] the defendant could reasonably conclude that the "prime" purpose for which the VMS devices were ultimately being used was for satellite decryption. This is the exactly the type of situation where the language in the statute sweeps unnecessarily broadly to invade the area of protected freedoms.

The government in its appellate brief, and the Fifth Circuit in its opinion, sought to get around this serious constitutional question by claiming that ". . .one who is bent on wrongdoing may not use the fair notice requirement as a shield" citing *United States v. Tansley,* 986 F.2d 880, 885 (5th Cir. 1993). The government maintained that the evidence of the defendant's guilt was so overwhelming that he should not be heard to complain about the vagueness of the statute. The appellate court agreed citing to alleged testimony that was given against the defendant. The court was simply wrong in what it cited and was embarrassing in its misunderstanding of the technical aspects of the case.

Undersigned counsel has practiced in the United States Fifth Circuit Court of Appeals for over a quarter of a century and has nothing but the highest respect for that court. However, the quantity of the work load has clearly had an adverse affect on the quality of the decisions. The petitioner will not divert from the basic constitutional issue in this application for writ to engage in a detailed analysis of the

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[9] The Court will recall from that for the VMS device to be used legitimately in conjunction with the VC-II Plus the Text-Mate connections had to be used.

errors in the Fifth Circuit decision, but does include in the Appendix portions from his original brief, reply brief, and application for rehearing which demonstrate with specific citations the numerous errors in that decision. No appellant should ever have to have his conviction upheld in an appellate court opinion so filled with errors and misstatements, not to mention complete misunderstanding of crucial technical points. It was not a question of the court viewing the evidence "in the light most favorable" to the government. The opinion cited numerous facts that not only were not supported by the record, but were diametrically refuted. When closely analyzed it is seen that the appellate court's main reason for concluding petitioner was "bent on wrongdoing" was because of what he knew others were doing with his product. However, that goes full circle back to the constitutional challenge.

The issue is not whether there is any evidence in the record from which the jury could have concluded that petitioner violated the statute. The point is that the jurors never had to reach that issue, because under the instruction of law given by the district court they were bound to convict the defendant based upon his own testimony that he knew others were misusing the product that he was manufacturing and selling. It is axiomatic that if a jury is presented with two theories of guilt, one valid and one invalid, a conviction must be overturned. *Mills v. Maryland,* 486 U. S. 367, 108 S.Ct. 1860 (1988); *Yates v. United States,* 354 U.S. 398, 77 S.Ct. 1064 (1957); *United States v. Mandel,* 862 F.2d 1067 (4th Cir. 1988); *United States v. Runnells,* 833 F.2d 1183 (6th Cir. 1987). As this Court stated in the *Mills* decision:

> With respect to findings of guilt on criminal charges, the court consistently has followed the rule

that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. *Ibid.* at 376, 395.

A decision that convicts a citizen for selling a perfectly legitimate article on the basis that he knows others will alter and use the product illegally is unconstitutional in violation of the due process clause of the Fourteen Amendment.

CONCLUSION

For the foregoing reasons petitioner Jeffrey B. Carr prays that this Court issue a writ of certiorari to the United States Fifth Circuit Court of Appeals to examine the constitutionality of 47 U.S.C. § 605 (e)(4) as applied to him in the prosecution which took place in the Eastern District of Louisiana.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30130
Summary Calendar

Filed
OCT 10 1995

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

JEFFREY B. CARR

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

(94-CR-191-ALL)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Jeffrey B. Carr was convicted of conspiracy to manufacture, sell, and distribute prohibited electronic communication intercepting devices. 47 U.S.C. § 605(e)(4); 18 U.S.C. § 2. He also was convicted of substantive violations of § 605 (e)(4). He appeals, arguing that there was a fatal variance between

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the indictment and the proof, that § 605 (e)(4) is unconstitutionally vague, and that the district court erred in calculating his offense level. Finding no error, we affirm.

I. PROCEDURAL HISTORY

Carr and two other individuals, Jerry McCarter and Jeff Mayes, were the principal officers of Video Marketing Services, Inc. (VMS), each holding one-third of the issued stock in that company. The company manufactured devices that could be used for lawful text delivery or, with some modification, for the unlawful purpose of decryption of satellite cable programming. On July 1, 1994, Carr and three codefendants (Ronald MacDonald, William Hunter, and Mike Hunter) were charged in a seven-count indictment with conspiracy and distribution of prohibited electronic communication intercepting devices. After a jury trial, Carr was convicted of all five of the counts in which he was charged. The district court sentenced Carr to 40 months imprisonment and three years supervised release on each of the five counts, the sentencces to run concurrently. Carr appeals.

II. FATAL VARIANCE

Carr contends that there was a fatal variance between the allegations in the indictment and the evidence presented at trial. In reviewing a claim of fatal variance, this Court reverses only if the evidence at trial varied from the allegations of the indictment and the variance prejudiced the defendant's substantial rights. *United States v. Faulkner,* 17 F.3d 745, 760 (5th Cir.), *cert. denied,* ____U.S.____, 115 S.Ct. 193 (1994). Substantial rights are affected if the defendant is surprised at trial or placed in risk of double jeopardy. *United*

States v. Robinson, 974 F.2d 575, 578 (5th Cir. 1992). Even assuming that Carr shows a variance between the indictment and the proof at trial, he has failed to establish that his substantial rights were violated.

Count 1 of the indictment alleged that, beginning at a time unknown but prior to 1993, and continuing through September 1993 Carr and other conspirators, named and unnamed, conspired to manufacture, sell, and distribute electronic devices (hereinafter referred to a VMS devices), knowing that the devices were primarily used in the unauthorized decryption of satellite cable programming. The indictment charged that the conspirators carried out the conspiracy by marketing the devices through a sham "Sales and Network Agreement" wherein distributors for VMS warranted that the devices would be sold only as a lawful text-delivery system. The indictment charged that by means of this sham agreement, VMS had a fraudulent protective shield with which to disclaim knowledge of and liability for the use of its devices in the unlawful decryption of satellite cable programming. Counts 4 through 7, the substantive counts, charged that on six occasions Carr sold and distributed the VMS devices, knowing that the devices were primarily of assistance in the unauthorized decryption of satellite cable programming.[1]

Carr asserts that the evidence at trial shows that there was a legitimate use for the VMS device — text delivery. He contends that the evidence showed that he was aware of the potential for consumers to use the device for illegally

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[1] Counts 3 and 3 charged Carr's three coconspirators, but not Carr, with similar substantive acts.

descrambling satellite television signals and that, because of this, VMS placed warning seals on all of its devices cautioning the users that the device was intended for text delivery only, that any other use would be illegal, and that the breaking of the seal would invalidate the warranty on the device.

Carr argues that although the Government offered some evidence that he had violated the antidecryption statute, there remains a fatal variance because he did not commit the violations *in the manner* alleged in the indictment. Carr argues that the Government asserted in the indictment that he and his coconspirators had accomplished their sales of the VMS device through "a sham 'Sales and Network Agreement' wherein VMS distributors apparently warranted that the VMS devices would be sold only as a lawful text delivery system."[2] He argues that the evidence at trial, however, showed that the "Sales and Network Agreements" were not shams but were in fact created at the suggestion of VMS's Jerry McCarter after he contacted an attorney about how to market the devices. Carr contends that if the sales agreements were not the ways and means of carrying out the illegal distribution of the VMS devices, as

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[2] The entire "ways and means" section of the indictment provides as follows:

> Among the ways and means by which the defendants and their coconspirators carried out the conspiracy was to market the VMS devices through a sham "Sales and Network Agreement" wherein VMS distributors apparently warranted that the VMS devices would be sold only as a lawful text delivery system. By means of this Agreement, VMS had a fraudulent protective shield with which to disclaim knowledge of and liability for the use of its devices in the unlawful decryption of satellite cable programming.

the indictment alleged, then Carr was not guilty of the charges in the indictment.

The evidence showed that at least one of the three founders of VMS, Jerry McCarter, believed that VMS was in fact established to manufacture and sell the VMS devices solely for the legal purpose of "delivering text" onto a television screen.[3] McCarter testified that he was aware that the VMS device could be used to pirate satellite programming and that that was why the company placed the warnings on the devices stating that they were to be used for text delivery only. There was also testimony, however, that, whatever McCarter's intentions were, Carr intended that the text delivery application of the VMS device be used only as a cover for the more marketable use of the device—decryption of satellite cable transmissions.

Peter Hoban testified that, before purchasing the VMS system from one of VMS's distributors, he talked to Carr over the phone about how the VMS device was capable of unscrambling the "wizard codes" that protected satellite programming from being pirated. Another witness testified that Carr told him that he had travelled to Canada to obtain the wizard codes from the data stream that came off of a certain satellite. Hoban testified about a meeting at his fishing camp attended by Carr and one of his coconspirators, Bill Hunter, at which the three discussed satellite piracy while Carr

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[3] McCarter believed that the VMS device could be used somehow in combination with outdated satellite dishes and modems to allow a person to receive text on their television screen using only his remote control. The viewer could then switch back and forth between normal television and text delivery simply by pressing a button on the remote control.

installed the VMS device into the Hoban's computer. Hoban testified that, while at the camp, Carr explained to him how the descrambling technology worked. Subsequent to Carr's installing the wizard codes into the host computer at Hoban's camp. Hoban testified that he purchased approximately 1000VMS devices from VMS and sold them to consumers for the purpose of unscrambling satellite programming signals. Without the wizard codes installed by Carr into Hoban's host computer, the VMS devices purchased by Hoban and sold to home consumers could not have been used to unscramble the programming signals.

Based on the evidence presented, the Government proved the elements of the crimes alleged in the indictment. It established that Carr conspired with at least Bill Hunter, Dana Lefever, and Peter Hoban to distribute VMS devices for the purpose of illegally descrambling satellite programming signals. Although the indictment alleged that Carr conspired with three other individuals (Ron MacDonald, William Hunter, and Mike Hunter) to commit the aforementioned acts, the indictment also states that Carr conspired with others, "named and unnamed." This Court has "held on numerous occasions that a defendant's conspiracy conviction can be upheld even if all other alleged coconspirators tried with him are acquitted, so long as the indictment alleges other named or unnamed coconspirators and there is sufficient evidence of a conspiracy involving these other individuals who were not tried with the defendant." *Faulkner*, 17 F.3d at 768 n. 35. Additionally, although Jerry McCarter may not have viewed the "Sales and Network Agreements" as a sham, the evidence indicated that Carr viewed them as a convenient cover for the illegal business. The indictment alleged as much. Accordingly, Carr has not show that the indictment failed to inform his adequately of the charges

against him to such an extent that he could not prepare his defense. *See United States v. Thomas,* 12 F.3d 1350, 1357 (5th Cir.), *cert. denied,* ____U.S.____, 114 S.Ct 1861 (1994). Nor has Carr Shown that he faces a risk of a second prosecution for the same offenses. *See id.* Because Carr's substantial rights were not affected, his claim of variance cannot by fatal. Carr is not entitled to relief on this claim.

III. UNCONSTITUTIONALLY VAGUE

Carr next contends that the anti-decryption statute under which he was charged and convicted is unconstitutionally vague and overly broad. "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness so that an ordinary person may understand what conduct is actually prohibited." *United States v. Tansley,* 986 F.2d 880, 885 (5th Cir. 1993). A reasonable degree of certainty, however, is all that is required. *Id.* Further, one who is bent on wrongdoing may not use the fair notice requirement as a shield. *Id.*

In pertinent part, 47 U.S.C. § 605 (e)(4) provides that "[a]ny person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming" shall be subject to fines and imprisonment. This Court previously has addressed a constitutional challenge to 47 U.S.C. § 605 (e)(4). In *United States v. Harrell,* 983 F.2d 36 (5th Cir. 1993), we held that § 605 (e)(4) "specifically proscribes the surreptitious interception of satellite transmissions and it is not vague or ambiguous at all." *Id.* at 39.

Although Carr acknowledges the holding in *Harrell*, he argues that it is not controlling because, in that case, the contention was that the statute did not make clear whether the prohibited conduct was intended to apply to individual users or only to commercial cable companies, rendering it void for vagueness. We agree that while *Harrell* precludes any facial challenge to the statute, it is not dispositive of Carr's claim that it is unconstitutional as applied to him.

Carr argues that whether the equipment was "primarily of assistance" in the unauthorized decryption of satellite programming is unconstitutionally vague and overly broad. It is undisputed that the devices were designed[4] to have text legally delivered through telephone lines and had to be modified before they could be used to illegally descramble the satellite signals. He further asserts that although the government's expert testified that the primary use of the device was to illegally descramble satellite signals after modification, the expert admitted that the devices had a legitimate function. He therefore argues that the application of the statute requires a citizen to guess at his peril how a legitimate piece of equipment might be misused by a buyer. Here, however, the evidence overwhelmingly showed that Carr knew that the devices would be modified so that they could be used to illegally intercept signals. Indeed, Carr

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[4] Carr's remaining arguments center on the fact that the device had to be modified before it could be used to illegally intercept the signals. Those arguements convince us that 18 U.S.C. § 2512 (1)(b) was not applicable to his conduct. Section 2512(1)(b) makes it a crime to possess an electronic device knowing "that the *design* of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications. . . ." However, he was convinced of violating § 2512(1)(b); instead, he was convicted of violating 47 U.S.C. § 605(e(4). Accordingly, we find the arguments afford him no relief.

admitted his knowledge of the intended illegal activity during his testimony. It is Carr's criminal knowledge, *not* the criminal intent of the purchaser of the device, that violates § 605 (e)(4). *Cf. Tobacco Accessories, Etc. v. Treen*, 681 F.2d 378, 385 (5th Cir. 1982) (intent requirement in drug paraphernalia statute includes seller, not just purchaser or manufacturer).

"[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. . . . One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. . . ." *Tansley*, 986 F.2d at 886 (brackets and ellipsis in opinion)(citation and internal quotation marks omitted). We find that § 605(e)(4) clearly applies to Carr's conduct, and, therefore, his challenge to the vagueness of the statute as applied to him must fail.

Car also contends that the statute is overly broad. "A statute will survive an overbreadth challenge unless it reaches a substantial amount of constitutionally protected conduct." *United States v. Wicker*, 933 F.2d 284, 287 (5th Cir. 1991)(citation and internal quotation marks omitted), *cert. denied*, 502 U.S. 958, 112 S.Ct. 419 (1991). To the extent that an overbreadth problem might occur in a particular application of § 605 (e)(4), such could "be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be implied." *Id.* at 288 (citation and internal quotation marks omitted). Carr has failed to show that § 605 (e)(4) reaches the requisite constitutionally protected conduct. We find no merit in Carr's claim that 47 U.S.C. § 605 (e)(4) punishes actions which are innocent or constitu-

tionally protected.[5]

IV. SENTENCING CALCULATION

Carr also contends that the district court erred by enhancing his offense level by 13 levels based on the total value of the devices sold. the presentence report (PSR) arrived at the increase by multiplying the number of VMS devices that VMS sold (39,000) by the retail values of the devices (ranging from $99 to $225). The PSR therefore estimated the total value to be between $2.5 million and $5 million. Based on that figure, pursuant to § 2F1.1 of the guidelines, the PSR recommended increasing Carr's offense level by 13. *See* § 2F1.1(b)(1)(N). Carr objected to the PSR's recommendation, asserting that "while there was evidence that VMS sold approximately 39,000 devices through various distributors there was no evidence presented that all of the devices were sold for illegal purposes, much less that all of the unnamed distributors purchased the devices for illegal use." At the sentencing hearing, the district court overruled

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[5] In the alternative, Carr argues that the district court erred in denying his request for the following jury instruction:

> The term "primarily of assistance" as used in the statute which I read to you means that the device "as designed" must render it primarily of assistance for the illegal intercept of encrypted satellite signals. A person who designs and distributes a device that is not primarily of assistance in illegal satellite interceptions does not violate the statute simply because he can reasonably anticipate that others might change the device so as to make it primarily of assistance in illegal interception.

The requested instruction adds an element (the "as designed" element) to the statute that does not exist. The district court therefore did not abuse its discretion in denying the requested instruction. *United States v. Pennington*, 20 F.3d 593, 600 (5th Cir. 1994).

Carr's objection, finding that "[t]he evidence at trial indicated that the defendant intended that each of the 39,000 be used for illicit purposes. The fact that the ultimate end user did or did not use the device in conformity with the law is not relevant."

On appeal, Carr contends that some of the 39,000 devices sold by VMS were used for legitimate purposes, presumably text delivery. He also argues that the number of VMS devices alleged in the indictment numbered only 77. He argues that the total loss would thus amount to only between $10,000 and $20,000 and that, under § 2F1.1, his offense level only would have been increased by three levels instead of 13. Of course, under the relevant conduct guideline, U.S.S.G. § 1B1.3, the conduct for which the defendant is sentenced is not limited to the conduct alleged in the indictment.

Moreover, "[a] district court's findings of fact for purposes of applying the Sentencing Guidelines are reviewed under the clearly erroneous standard of review." *United States v. Hooker,* 997 F.2d 67, 75 (5th Cir. 1993). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-76, 105 S.Ct. 1504, 1511-12 (1985).

In sentencing, the district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial. § 6A1.3, comment.; *accord United States v. Manthei,* 913 F.2d 1130, 1138 (5th Cir. 1990). The PSR itself bears such indicia. *United States v. Alfaro,* 919 F.2d 962, 966 (5th Cir. 1990). At trial, there was testimony that Carr "knew what

the part was being sold for." The court also heard a tape recording of a conversation between an undercover agent and Carr related to illegal descrambling devices in which Carr indicated his willingness to sell the device, and he also asserted that they had "70,000 boards being updated through [their] system." The undercover agent explained that he understood "updating" to mean that they were transmitting wizard codes.

Carr has not met his burden of proving that the information relied upon by the district court is "materially untrue, inaccurate or unreliable," and, thus, the district court's determination is not clearly erroneous. *See United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991).

Accordingly, the district court's judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 95-30130

Filed
NOV 27 1995

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JEFFREY B. CARR
Defendant-Appellant

. . . . . .

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

. . . . . .

ON PETITION FOR REHEARING

(November 27, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is ***Denied.***

ENTERED FOR THE COURT:

/s/

United States Circuit Judge
REHG-2

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30130
Summary Calendar

Filed
OCT 10 1995

D.C.Docket No. 94-CR-191-ALL

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JEFFREY B. CARR
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

Before KING, SMITH, and BENAVIDES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

October 10, 1995

ISSUED AS MANDATE: DEC 5 1995

OP-11-S

APPENDIX D

USA # 9301709

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INDICTMENT FOR CONSPIRACY AND DISTRIBUTION OF PROHIBITED ELECTRONIC COMMUNICATION INTERCEPTING DEVICES

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO. 94-191
v.	*	
		SECTION G.
JEFFREY B. CARR	*	MAG.1
WILLIAM HUNTER		
MIKE HUNTER	*	VIOLATION:
RONALD MACDONALD		47 U.S.C. § 605 (e)(4)
	*	18 U.S.C. § 371
		18 U.S.C. § 2
	*	

* * *

The Grand Jury charges that:

COUNT 1

A. AT ALL TIMES MATERIAL HEREIN:

1. Residential satellite systems that receive television broadcasts can legitimately receive descrambled signals through a legal descrambling device, the Video Cipher II satellite descrambler module, which is marketed by General Instrument Corporation. By using the Video Cipher II, the

legal consumer can receive the program(s) of his/her choice upon paying a monthly subscription fee.

2. **JEFFREY B. CARR,** defendant herein in Counts 1 and 4 through 7, was one of three principal officers of Video Marketing Services (hereinafter VMS), Red Boiling Springs, Tennessee. At the VMS facility, **JEFFREY B. CARR** manufactured electronic devices, hereinafter referred to as VMS devices, that were specifically designed to be easily attached to the Video Cipher II modules for the purpose of bypassing the modules' original security and legal authorization functions.

3. **WILLIAM HUNTER** and **MIKE HUNTER,** defendants herein in Counts 1, 3, and 5 through 7, doing business as Hunter Electronics, in Cambridge, Ontario, Canada, were a major distributor for VMS, selling VMS devices throughout the United States.

4. **RONALD MACDONALD,** defendant herein in Counts 1 and 2, doing business as Future Vision, in Burlington, Ontario, Canada, was a major distributor for VMS, selling VMS devices throughout the United States.

B. THE CONSPIRACY:

Beginning at a time unknown but prior to 1993, and continuing through September 1993, in the Eastern District of Louisiana and elsewhere, **JEFFREY B. CARR, WILLIAM HUNTER, MIKE HUNTER,** and **RONALD MACDONALD** did knowingly and willfully combine, conspire, confederate, and agree with each other and persons known and unknown to the Grand Jury to manufacture, sell, and

distribute electronic devices and equipment, knowing and having reason to know that the devices and equipment, knowing and having reason to know that the devices and equipment were primarily of assistance in the unauthorized decryption of satellite cable programming, and were intended for the unauthorized divulgence and publication of the contents of interstate and foreign communications transmitted and received by encrypted radio transmissions; all in violation of Title 47, United States Code, Section 605(e) (4).

C. WAYS AND MEANS:

Among the ways and means by which the defendants and their coconspirators carried out the conspiracy was to market the VMS devices through a sham "Sales and Network Agreement" wherein VMS destributors apparently warrented that the VMS devices would be sold only as a lawful text system. By means of this Agreement, VMS had a fraudulent protective shield with which to disclaim knowledge of and liability for the use of its devices in the unlawful decryption of satellite cable programming.

D. OVERT ACTS:

On or about the following dates, in the Eastern District of Louisiana and elsewhere, **JEFFREY B. CARR, WILLIAM HUNTER, MIKE HUNTER, RONALD MACDONALD** and their coconspirators committed the following overt acts, among others, in furtherance of the above described conspiracy:

1. In or about August 1992, **JEFFREY B. CARR** and **RONALD MACDONALD** in Burlington, Canada,

attempted to market the VMS device over the phone with the owner of Emerald Satellite in Ocala, FL, and discussed with him how to use the VMS device with the Video Cipher II module.

2. On or about May 1, 1993, **JEFFREY B. CARR** and **WILLIAM HUNTER** met in Ocala, FL, with the owner of Emerald Satellite in order to establish him as a distributor of VMS devices.

3. On or about May 31, 1993, **RONALD MACDONALD** shipped 10 VMS devices and 10 U24 Bypass devices, another unlawful descrambling device, from the Future Vision facility to Richard Collins, New Orleans, LA.

4. On or about June 16, 1993, **WILLIAM HUNTER, MIKE HUNTER,** and VMS distributor Dana LaFever shipped 50 U24 Bypass devices from the Hunter Electronics facility to Richard Collins, New Orleans, LA.

5. On or about June 28, 1993, at the request of **MIKE HUNTER,** VMS sent by FAX to "Mike' in Chalmette, LA, a diagram illustrating how to hook a modem onto the VMS device.

6. On or about July 7, 1993, pursuant to the instructions of **MIKE HUNTER,** VMS shipped from its facility to "Mike" in Chalmette, LA, the first of six shipments each containing 10 VMS devices.

7. On or about July 15, 1993, **JEFFREY B. CARR** delivered 100 VMS devices to DANA LaFever at the Fiddler Inn, Nashville, TN.

8. On or about July 15, 1993, at the Fiddler Inn, Dana LaFever introduced Richard Collins to **JEFFREY B. CARR** as a customer of the VMS devices in New Orleans, LA.

9. On or about August 2, 1993, "Camper," a shipping agent located in Red Boiling Springs, TN, acting on behalf of **JEFFREY B. CARR, WILLIAM HUNTER,** and **MIKE HUNTER,** shipped the first of two shipments containing VMS devices to an associate of Richard Collins in New Orleans, LA.

10. On or about August 13, 1993, **JEFFREY B. CARR,** under the nickname "Software Jeff," instructed "Winston" in Pearl River, LA, over the phone on how to install VMS devices onto Video Cipher II modules.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2-7

A. Sections A, C, and D of Count 1 of this Indictment are realleged and incorporated in Counts 2 through 7 herein by reference as though each allegation was set forth herein at length.

B. On or about the dates listed below, in the Eastern District of Louisiana and elsewhere, **the respective defendants as identified below,** did knowingly and intentionally manufacture, sell, and distribute, and did aid, abet, and cause to be manufactured, sold, and distributed, electronic devices and equipment, knowing and having reason to know that the devices and equipment:

1) were primarily of assistance in the unauthorized decryption of satellite cable programming; and

2) were intended for activity prohibited by this U.S. Code section, namely the unauthorized divulgence and publication of the contents of interstate and foreign communications transmitted and received by encrypted radio transmissions:

COUNT	DATE	DEVICE
	RONALD MACDONALD only	
2.	MAY 31, 1993	10 VMS devices 10 U24 Bypass devices
	WILLIAM HUNTER and MIKE HUNTER only	
3.	June 16, 1993	50 U24 Bypass devices
	JEFFREY B. CARR only	
4.	July 15, 1993	15 VMS Devices
	JEFFREY B. CARR, WILLIAM HUNTER, and MIKE HUNTER only	
5.	July 7, 1993	10 VMS devices
6.	August 2, 1993	12 VMS devices
7.	August 19, 1993	30 VMS devices

All in violation of Title 47, United States Code, Section 605(e)(4), and Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ illegible

FOREPERSON

/s/ Robert J. Boitmann

ROBERT J. BOITMANN
UNITED STATES ATTORNEY
Bar Roll No. 3190

/s/ Jan Maselli Mann

JAN MASELLI MANN
Assistant United States Attorney
Chief, Criminal Division
Bar Roll No. 9020

/s/ Peter G. Strasser

PETER G. STRASSER
Assistant United States Attorney
Bar Roll No. 19169

New Orleans, Louisiana
July 1, 1994

APPENDIX E

ORIGINAL BRIEF

General Instruments was understandably upset with its latest failure and working in conjunction with Special Agent Richard Coleman of the United States Customs Service they set up an undercover operation in which Agent Coleman posed as a satellite, pirate, named Richard Collins. Vol. IV, p. 532. In that capacity he purchased some VMS devices from one of the company's distributors, Mr. Dana Lafever. However, the devices as delivered by VMS to Mr. Lafever were not capable of intercepting satellite signals and were only capable of delivering text through telephone lines. Believing that the text delivery system was merely a front to allow the company to sell illegal satellite descramblers Agent Coleman contacted VMS and posing as Collins spoke with Jeffrey Carr and secretly recorded their converstion. Mr. Carr told him that he could not sell him VMS devices as they only sold through distributors and the VMS devices were designed for delivery of text. Agent Coleman again working in undercover capacity happened to meet Mr. Carr at a convention in Nashville, Tennessee, at the hotel room of Dana Lafever. Agent Coleman surreptitously recorded that conversation and once again Mr. Carr emphasized that their system was designed for text delivery. Vol. III, pp. 318-323.

Nevertheless, Agent Coleman and the personnel at General Instruments with whom he was working continued to believe that the VMS operation was simply a front to sell illegal descramblers and therefore they concocted an

elaborate scheme to prove the VMS was in fact "dirty".[6] Agent Coleman claimed to have been working with other hackers who had come up with a method of "cloning" the VC-II Plus. While the concept was electronically very complicated the experts at trial explained that each VC-II Plus unit had an identifying "finger print" that was unique to it. This secret code, which was also described as something like individual social security numbers, would allow the VC-II Plus to receive descrambled signals from the new data stream being sent by satellite. If in fact a hacker had been able to reverse engineer the General Instrument software and break that code then the VC-II Pluses would be obsolete. Likewise, VMS' concept of installing their devices in conjunction with the VC-II Pluses would be doomed, Vol. V, pp. 782-789.

Agent Coleman playing the part of a crooked satellite pirate was offering to put on a showing of the cloned unit in New Orleans and insisted that anyone wishing to see the demonstration had to be ready to purchase the device for $50,000.00. Vol. IV, pp. 532-534. Neither Jeff Carr nor Jeff Mayes had any intention of purchasing the unit, but they were desperate to find out if any hacker had successfully cloned the VC-II Plus. Therefore, since Agent Coleman acting in his undercover capacity made it clear that he would only deal with satellite pirates Mr. Mayes and Mr. Carr pretended to be involved in such activity so that they could get an opportunity to view the demonstration. Of course, all of the conversations were surreptitously recorded by Agent Coleman and while Mr. Carr did play the part of a hacker in order to see the demonstration that was the limit of his

---

[6] The sting operation was not limited to VMS as there were others who were being targeted, but it was conceded that VMS was certainly a prime target.

willingness to do so. After he had seen the demonstration and Agent Coleman continued to engage him in conversation regarding the VMS operation in an effort to get Mr. Carr to concede that it was in fact just a front to sell illegal descrambling equipment, Mr. Carr made it clear that that was not correct and that they did in fact have a legitimate operation. Dissatisfied with that response Agent Coleman then identified himself as being a Custom's agent and placed Mr. Carr under arrest. Vol. IV, pp. 464-511; Vol. V, pp. 785-798.

Two days after Mr. Carr was arrested Agent Coleman and numerous other agents of the United States Custom Service executed a search warrant at the VMS offices in Red Boiling Springs, Tennessee and seized all of the company's records, computers, computer discs and electronic products and parts. Vol. IV, pp. 541-545. The search disclosed no devices, equipment, parts, or records relative to illegal satellite decryption.[7] Agent Coleman then began a series of interviews with various persons whom he was able to learn from the VMS records had purchased VMS devices. He found some persons who were using the product illegally and they were given immunity if they would give information against

---

[7] The agents did recover one piece of software that contained every possible use for the VMS equipment, both legal and illegal. However, the print out from the disc disclosed it to be not a record of VMS but rather a retrieval from a computer bulletin board. Mr. McCarter and Mr. Carr explained that when they accused Ron MacDonald of using their VMS devices for illegal purposes he at first denied doing so. They therefore secured access to his bulletin board and purchased everything that related to VMS devices. When they printed out that information it disclosed that he in fact was selling information on how to use the VMS devices for illegal decryption and that is when they quit doing business with him. Vol. IV, pp. 638-643; Vol. V, pp. 736-741.

Jeff Carr. The particulars of the information supplied by those witnesses will be covered in the argument portion of this brief, but the record will disclose that for the most part the witnesses simply concluded that Jeff Carr knew that they were using the product illegally because he assisted them on various occasions with technical help. However, the record also reflects that the assistance which Mr. Carr rendered to those individuals was entirely consistent with the VMS devices being used for legal text delivery. Vol. V. pp. 755-782.

APPENDIX F

REPLY BRIEF

B. *Was The Government's Evidence Of Guilt In Fact "Overwhelming" And/Or "Clearly Established?*

According to the evidence presented at trial, as well as the arguments in its appellate brief, the government primarily rests its case upon the testimony of Dana LaFever and Pete Hoban, and the statements made by the defendant when his conversations were clandestinely being recorded by Special Agent Coleman.

Taking the last issue first the defense would note that most of the testimony in the taped conversations was consistent with what the defendant had always maintained. That is, he pointed out that their equipment was designed for delivery of text. However, the government handles those statements the same way it handled the network agreements with the distributors. That is, everything the defendant says, or his company does, that is consistent with innocence the government simply scoffs at as being part of the "cover story". Yet these were statements made to an undercover agent acting the part of a satellite pirate. If in fact the defendant was knowingly and intentionally selling VMS devices for illegal satellite descrambling there would have been no reason for him to have constantly talked about text delivery systems to his fellow pirates.

The government makes much of the so called "admissions" which Mr. Carr made on the tape when he came to New Orleans for the demonstration of the "cloning" of the General Instruments VC-II Plus. The defense will not repeat

the explanation given in its original brief except to note that when the Custom Service and General Instruments pretended to come up with a device that could potentially put the defendant's company out of business, and then made it clear that they would only show that device to persons who wanted to use it illegally, it was not surprising when the defendant agreed to play the part of a "hacker".

Furthermore, the defendant's explanation at trial that a successful cloning of the VC-II Plus would put VMS out of business was actually discussed with "Mr. Collins" in the New Orleans meeting.

Carr:

> . . . . Anybody can see this is going to be major, you know, major something for the industry if you guys, you know, if it works like you say. And I have no reason to doubt you that it does. And it looks good and everything. So, so, you know, I just, like I say, we're just, you know, you see, *it's going to affect our business quite a bit, what you guys have got.*
>
> COLEMAN: Well, if shouldn't affect your business at all, really, man. If you - -
>
> CARR: Well - -
>
> COLEMAN: - - if you truly have a business that you really believe is no illegal implications to it - -
>
> CARR: Well - -
>
> COLEMAN: -- then this has no effect on your business whatsoever.

CARR: *It really does.* It does - - well, what it does is *it affects the business as far as,* as far as, you know, whether, you know, *whether people are going to be buying Plus boards or old boards and, and I'm expecting it to sell a lot of Plus boards,* actually, is what I'm thinking. So that it makes it more, more suitable for, like, a text-made product ad stuff so you can run two boards at the same time - -

COLEMAN: Right.

CARR: - - and stuff. So, you know, so that you could use the text board and the Plus board, you know. Basically, you could - - could - - as a matter of act, you could use this to, you know, if they wanted to illegally, get programming illegally - -

COLEMAN: Sure.

CARR: - - and then, then they could, then they could use our product to do text and receive text and watch the Home Shopping Club and do any ordering and stuff over the phone lines. That would be great. Nov. 16, 1994, Coleman, pp. 46-47.

It can be seen from the above that even when Mr. Carr was talking to a person he thought was selling an illegal clone he still was discussing the ability of VMS to use its product for text delivery. As usual the government agent rejects anything said by the defendant that identifies the legal use of the VMS device. Mr. Collins [Agent Coleman] responded:

COLEMAN: Well, I'm going to tell you honestly what I think, Jeff. I think it's - - I think it's a terrific marketing ploy that you've got, you know, but

> I'm really disappointed that you're even keeping it up with me right now because I'm offering you, I'm offering you the seed key pullers for the II Plus modules. And, you know, for us to do business, I - - I - - I'm going to tell you what I don't want to do. I don't want to do business with somebody who is so naive as to believe what the're doing is legal, okay? I don't want to do business with these type of people. *Ibid.* p. 48.

The Court can see from the above response by Agent Coleman that he was cutting off Mr. Carr whenever he (Carr) attempted to explain the legitimate use of the VMS device. Agent Coleman made it clear that he did not want to even discuss any "legal" uses for the device. Under such circumstances it is certainly understandable that Mr. Carr would pretend to be "dirty" and any "admissions" made at that time are of questionable value.

The defense recognizes that this was a credibility call for the jury to make. It simply pauses here to emphasize that there was much in the surreptitiously recorded conversations with the defendant Carr that supported his position at trial.

The same is true regarding the testimony of Mr. Lafever that the government brief touts so highly as being supportive of the prosecution's case. For example, on pages 7 and 8 of the government's brief there is set forth a clear chronology in which Mr. LaFever is supposedly tstifying regarding how he and the defendant Carr, together with Ronald MacDonald in Canada, worked out a conspiracy to use VMS devices for illegal descrambling. The argument in the government's brief continues:

> With Carr's knowledge, LaFever then brought a host computer and VMS devices from MacDonald, and signed onto MacDonald's bulletin board, called the "Sweating Pig", to receive the wizard keys. Soon thereafter, Carr became suspicious that MacDonald had duplicated the VMS device, and was in effect stealing it from him. Carr and LaFever decided to test MacDonald: LaFever placed an order with MacDonald to see if MacDonald would in turn place the order with Carr. MacDonald did not so Carr terminated his distributer relationship with MacDonald. Govt's Brief p. 8.

The above would indeed be damning testimony had it been given with the clarity and certainty stated in the government's brief. It was not. And the weakness of the testimony did not come about merely as a result of cross-examination. Even on direct examination despite repeated and flagrant leading questions by the government the testimony simply does not support the claim of a "clearly established" conspiracy. Govt's Brief, p. 16.

The defense has always conceded that Mr. Carr knew that, notwithstanding explicit instructions to the contrary, some of the VMS dealers would succumb to the temptation to use the product illegally. When the government agent served a search warrant and seized all of the records of VMS and got the names of all of its customers it was predictable that they were going to find some who were using the devices for descrambling. Further, it was not surprising that when confronted with the possibility of having to serve life in prison and having his spouse arrested[3] the dealer would be very

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[3] Mr. LaFever: "The agents talked to me kind of in a, in the manner,

anxious to tell the government whatever it wanted to hear. The defense does not suggest, or believe, that the government agents ever told any witnesses to lie. Rather, they approached the witness with a preconceived idea of what happened and those who were able to support that view got concessions, and those who did not got prosecuted. It is not a question of bad faith; it is simply, "When you're a hammer the whole world looks like a nail." However, even witnesses who are trying their best to placate the government have difficulty saying everything that the prosecutors want to hear. So it was with Mr. LaFever.

For example, when the government was trying to get Mr. LaFever to describe the alleged conspiracy in which Ronald MacDonald was involved the following testimony was given on direct examination:

> Q. Okay. Now did - - around this time period, did you ever talk with Jeffrey Carr and ask him whether or not you could purchase some of these devices from him to tap into the commercial data stream?
>
> A. I was - - there was a time that that happened. It was quite a while after I first learned that those kinds of projects were being worked on. Maybe a month, two months, maybe three, I'm, not sure, but there was a time when I did call him to see what the possibilities would be of me getting something like that.

---

footnote 3 continued

that, you know, I could go to jail for the rest of my life and part of my next life and my wife could be arrested and everything.' Nov. 15, 1994, LaFever, p. 32.

Q. And what did he tell you would have to do if you wanted to get one of those, could you buy them directly from him, or would you have to go elsewhere?

A. I'd have to buy them from Ron MacDonald.

Q. And why Ron MacDonald?

A. Because, *apparently — and I think I heard a couple of stories.* I'm trying to think back — that he'd either purchased —

MR. MURRAY: Excuse me, your Honor. I mean, "a couple of stories." If he's saying what Mr. Carr said —

[Objection and discussion deleted]

Q. The name of the bulletin board service that MacDonald had, what was the name of that service?

A. Well, his main — well, he had two bulletin boards, as I found out. The main one that he advertised was called Future Vision and that has, like, three or four phone lines to it.

And then he had another, like a special board. If you were a special person, you could call the board called the Sweating Pig.

Q. And did you discuss with Jeffrey Carr that you were receiving the wizard codes off this Sweating Pig bulletin board service?

A. *I'm not sure if I did* the Sweating Pig, but I know

that we had talked about his other bulletin board. *We may have* discussed the Sweating Pig, but *I wasn't on the "Pig" for that long.*[4]

Q. Okay. In the context of your conversations with Mr. Carr, did the term "seed key farm" every come up?

A. *I can't remember a specific conversation regarding seed key farm,* but I'm sure — I mean, that was a term that was in everyday use as much as VC II or modem was, so I'm sure that —

Q. Okay. Explain to us what a seed key farm is.

A. My understanding of a seed key farm is just simply a place where seeds are gathered and codes are developed and, you know, offered to people.

Q. And they're offered to the bulletin board service?

A. Yeah. They were always — there was always numbers on the bulletin board.

Q. Okay. Around the end of 1992, did you have a discussion with Mr. Carr about whether or not Ronald MacDonald may be manufacturing the VMS device himself as opposed to ordering it directly from the defendant, Mr. Carr?

---

[4] The Court will note that not only does Mr. LaFever fail to testify that he ever discussed getting wizard codes from Mr. MacDonald with Mr. Carr, but he does not even say that the wizard codes came from the 'Pig" bulletin board. The prosecutor says that. If it was the source of the wizard codes and if Mr. LaFever was using them for his satellite descrambling during 1992 and 1993 how is it he was not "on the Pig" for "that long"?

A. There was a conversation to that regard because I hadn't talked to Jeff in a long time because,you know, I was dealing with Ron MacDonald and I don't remember exactly when, but there was a time that there was a question of whether Ron was making his own devices and selling them, or whether he was following his contract and ordering them from the VMS Company.

Q. So, as a result, did you and Mr. Carr discuss how you could determine whether or not Ron MacDonald was actually doing this?

A. I did place a large order with Ron MacDonald.

Q. Backtrack. Listen to, to my question. My question is: Did you and Mr Carr discuss whether or not you would try to figure out a way to determine whether or not —

A. Yes.

Q. — he was doing that? Okay.

A. And which I placed an order with Ron, I don't know, 200 items or something like that and I never got the items. I either canceled the order or told him, "Never mind," *or whatever, I don't know. But I think* the test was to see if Ron was going to turn around and order them from VMS.

Q. And did he order them from VMS?

A. *I don't think so. I don't remember the specific conversation or the follow-up conversation about*

that, but I know that there was some sort of ill feelings between MacDonald and VMS to such a degree that I was able to buy from that point forward, right directly from VMS.

* * * *

Q. Now in the course of your discussions with Jeffrey Carr was there any question about the fact that you were using these devices for descrambling of equipment?

A. *I believe*, you know, based on all of our prior conversations and the fact that I was, you know, getting codes from Ron MacDonald and — repeat your question, please.

Q. Okay. Based on your discussions with Jeffrey Carr, was there any question about the fact that your purchasing of these devices from him was for the purpose of descrambling satellite equipment

A. *In my mind*, no.

Nov. 15, 1994, LaFever, pp. 6-13. (Emphasis added.)

The Court can see from the above language the witness was a long way from giving the clear testimony which the government describes in its brief. More importantly there is nothing in any of Dana LaFever's testimony where he ever states that Mr. MacDonald ever told him that he (MacDonald) had conspired with the defendant Carr, nor that Carr ever told him that he (Carr) ever conspired with MacDonald. He simply testified that in the beginning MacDonald was a distributor for VMS and that he (LaFever) got his product

from MacDonald and that he and MacDonald knew that they were going to convert the product to use it illegally. To the contrary, in all of his conversations with Mr. Carr he was told that the device should only be used for the delivery of text. Nov. 15, 1994, LaFever, pp. 24-25. Again this is part of direct examination.

Even more telling is the following testimony of Mr. LaFever also on direct:

> A. I think I'd been — I think I'd been somewhat conditioned to always say that I'm using it for text, you know. *From the very first time that I bought the — from the very first one I bought the program from Ron MacDonald, it was, you know, explicity written out that if VMS was ever contacted, if you say you're using it for codes or anything other than text they'll hang up or they won't sell it to you,* or something. It was just, I think, just, I'd say, a continuation of that, you know. It's just that was —
>
> Q. It's like a cover story?
>
> A. Yeah, kind of thing.
>
> MR. MURRAY: Objection to leading, Your Honor. This —
>
> THE COURT: Don't lead your witness.
>
> MR. MURRAY: That's improper and counsel knows it.
>
> THE COURT: Let's don't lead your witness.

THE WITNESS: I would say that it was consistent with everything that we had done up to that point, or anything that I had done. *Whenever I would call VMS, I'd never say that I'm using it for codes. I mean, even if I thought they knew, it was just, you just didn't discuss that.* You always said, "Well, it's text," you know? *Ibid.* (Emphasis added.)

Once again the Court will see that every time the defendant or any witness said anything favorable about VMS only wanting the device to be used for text delivery the government would try to argue that it was simply a "cover story". The government stated in its brief that it proved through the testimony of Mr. LaFever that Mr. Carr and Mr. MacDonald were co-conspirators, yet the testimony of Mr. LaFever shows that Mr. MacDonald was cautioning him (LaFever) not to tell anyone at VMS that he was using the product illegally. The witness conceded, again on direct examination, that when he visited the VMS plant in Nashville that he was told by the VMS personnel that the product was only supposed to be used for text delivery. *Ibid.* p.27.

Mr. LaFever further conceded on cross-examination that while it had originally been his personal opinion that VMS was selling the devices knowing that they would be used illegally, after visiting the plant and talking with Mr. McCarter he was convinced that there was a genuine intent and desire that the product be used legally and exclusively for text delivery. *Ibid.* pp. 49-51.

Finally, while the government tried to get Mr. LaFever to say that the conversation which Agent Coleman had recorded in the hotel room in Nashville had technical jargon which related to illegal satellite decryption, when questioned

specifically on that point Mr. LaFever acknowledged on cross examination, and even on redirect examination, that all of that conversation could just as easily be applicable to discussing a text delivery system. *Ibid.* pp.39;53-56.

In short, while a juror might have been able to infer from the totality of Mr. LaFever's testimony that the defendant Carr knew that he (LaFever) was using the devices illegally there was absolutely nothing in that testimony to indicate any conspiracy between Mr. Carr and/or Mr. MacDonald, and/or Mr. Bill Hunter, and/or Mr. Mike Hunter, which was the charge alleged in the indictment.

The government fared no better with its other star witness, Mr. Pete Hoban. The gist of Mr. Hoban's testimony was that he was buying VMS devices from Mr. Bill Hunter, one of the VMS distibutors, and he (Hoban) was using the devices for illegal satellite descrambling. From his testimony, it was clear that he and Bill Hunter had conspired to use the devices illegally, but there was no testimony about Bill Hunter having conspired with Jeffrey Carr, which was the charge in the indictment. However, the government argued in its brief as follows:

> Carr then explained to Pete Hoban how the VMS device could be used to unscramble the wizard codes. Thereafter, both Carr and Hunter came to Ocala, where they set up the host computer at Hoban's fishing camp for the specific purpose of receiving the wizard codes from Canada.
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> ****

Hunter and Carr's discussions with Hoban at the fishing camp focused on piracy.

Once again here is a situation where the government's case would have been strong had the testimony been as described in its brief. Once again, it was not. In actuality Mr. Hoban testified that the discussions going on between Mr. Hunter and Mr Carr were too technical for him to understand. He *never* stated that there were any discussions which "focused on piracy". Mr Hoban who testified that he was given a grant of immunity by the government and had been told by Agent Coleman that, ". . .[t]he ship was sinking and [he] could either get on a lifeboat or go down with the ship"[5], had the following to say about the meeting in Ocala.

Q. Okay. What did Mr. Carr do when he came down and went to that fish camp with that computer, what did he do?

A. He helped us get the system running.

Q. By help you get the system running, can you be more specific? What did he do?

A. *I don't know* whether the software was downloaded at the fish camp or whether — excuse me — whether it was entered into the computer at the fish camp, *I don't know. These guys are yakking a hundred miles an hour on stuff I don't understand, so I'm not even sure exactly specifically what they were doing.*

Q. Okay.

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[5] Nov. 15, 1994, Hoban, p. 61.

A. My main concern was that the system worked and it worked. You know, it's like a mechanic fixes your car, you know. You're not exactly sure what he's doing, in some cases, but if it's running when he's through, then you know he's fixed it.

Q. Okay. What did you see Mr. Carr do with regard to that computer?

A. Okay. I saw him, you know, working on the computer.

Q. Jeff Carr?

A. Yeah. I'm trying to picture it in my mind, but I can't quite draw the picture of, you know, him actually—yeah, I—okay. It was in the entrance of the fish camp where he was working on the computer, yeah.

Q.. Okay. Who got the computer node running?

A. Well, Jeff and Bill did.

Q. Okay. After they got it running—let's leave the fish camp—tell us what happened.
Ibid. 47-48. (Emphasis added.)

The defense again emphasizes that the foregoing testimony was given on direct examination and does not even come close to corroborating what the government said in its brief. To the contrary, when asked specifically about what conversations he had with Mr. Carr regarding the use of the equipment, Mr. Hoban said that the defendant talked to him

about using it for text.

Q. Okay. Did you ever, to the best of your memory, have any conversations with Jeff Carr regarding using these VMS devices for text or advertising?

A. No. *Oh, wait a minute. I take that back. Yes.*

Q. Okay. Can you tell us—

A. Sure.

Q. —about this conversation?

A. *He told me how they would work for advertising.*

Q. Okay. Go ahead.

A. He said, I think, you know, he said that if a dealer wanted to they could go to the local pizza store and when the pizza store was having a special, he could download it, you could download that information to the customers.

Q. Okay. Why would—why did you not participate in that?

A. Because that's not what we were trying to do. We weren't interested in a pizza store business. We were interested in keeping our customers up and running.

Q. Okay.

MR. THOMPSON: One second.

BY MR. THOMPSON:

Q. Did there come a point where you talked to Jeff Carr about something he may have done in Canada?

A. You have to be a little bit more specific than that.

Q. Okay. Did anyone ever tell you who wrote the software to set this entire system up?

A. *You mean just come right out and say it? No.*

Q. No. What I'm asking is do you know—did Jeff Carr ever discuss with you who made the software for the system and who put it and who worked with it in Canada?

A. *Not really.* You know, just from the general conversations, you know, I had between him and Bill, you know, *I assume that Jeff wrote the software.*

Q. Okay.

A. But he never came out and said, "I wrote the software for this." He never came out and said that to me.

Q. Okay. Are you—do you have knowledge or are you aware of who actually put the software in the computer in Canada?

[Objection and discussion deleted.]

BY MR. THOMPSON:

Q. Did Jeff Carr discuss with you who loaded the software into the Canadian computer?

A. *No. Ibid.* pp. 49-52 (Emphasis added)

Mr. Hoban admitted that the reason that Mr. Carr was in Ocala was to attend a trade show and that at the trade show he was demonstrating the text capability of the VMS product and was handing out flyers explaining how it worked. *Ibid.* pp. 65; 73-74.

It is therefore seen that there was never any conversation with Mr. Carr regarding satellite piracy. The only conversation that Mr. Hoban had with him related to delivery of text and the purpose for Mr. Carr being in Ocala was to attend a trade show where he was demonstrating the equipment and its text delivery capabilities, and was handing out literature for that purpose. It should be again emphasized that there was nothing sinister about Mr. Carr assisting with the installation of the host computer. The text delivery system which VMS had designed employed a host computer and it was therefore perfectly understandable that Mr. Carr would be helping a VMS distributer in installing such a computer.

APPENDIX G

APPLICATION FOR REHEARING

II. *Was The Evidence Of Guilt Against The Defendant Overwhelming?*

The government contended in its brief that the evidence of the defendant's guilt was overwhelmingly established and the Court used that same description on page 9 of its opinion. It was partly because of that conclusion that the Court ruled that the defendant could not avail himself of any alleged vagueness or overbreath of the statute because such a challenge is not applicable to one who is "bent" on violating the statute in any event. Opinion p. 7. The Court further ruled on page 9 that a person to whose conduct a statute "clearly applies" may not successfully challenge the statute as being unconstitutionally vague. The defense therefore explores the issue regarding the weight of evidence before turning to the question of the constitutionality of the statute.

In concluding that the evidence of the defendant's guilt was strong this Court stated on pages 5 and 6 of its opinion the following reasons:

> Peter Hoban testified that, purchasing the VMS system from one of the VMS's distributors, he talked to Carr over the phone about how the VMS device was capable of unscrambling the "wizard codes" that protected satellite programming from being pirated. Another witness testified that Carr told him that he had travelled to Canada to obtain the wizard codes from the data stream that came off of a certain satellite. Hoban testified about a meeting at his fishing camp attended by Carr and

> one of his coconspirators, Bill Hunter, at which the three discussed satellite piracy while Carr installed the VMS device into the Hoban's computer. Hoban testified that, while at the camp, Carr explained to him how the descrambling technology worked. Subsequent to Carr's installing the wizard codes into the host computer at Hoban's camp, Hoban testified that he purchased approximately 100 VMA devices from VMS and sold them to consumers for the purpose of unscrambling satellite programming signals. Without the wizard codes installed by Carr into Hoban's host computer, the VMS devices purchased by Hoban and sold to home consumers could not have been used to unscramble the programming signals Opinion pp. 5-6.

The statements regarding Mr. Hoban are simply not correct. He did not state that he spoke to Mr. Carr in Canada. Rather, he said he spoke with someone who had a "Tennessee accent", whatever that is, and he specifically stated that he could *not* say that that person was Mr. Carr. Nov. 15, 1995, Hoban, pp. 24-25. None of the above statements regarding the meeting at the fishing camp are accurate. Mr. Hoban *never* reported having *any* conversation with Mr. Carr dealing with illegal piracy. *Ibid.* 2-85. Further, he testified that the conversations that Mr. Carr and Mr Hunter were having were too technical for him to understand. *Ibid.* 47-48. Mr. Hoban testified that Jeff Carr was in Ocala attending a trade show in which he was demonstrating and handing out literature on how to use the VMS device for *text delivery. Ibid.* pp. 65; 73-74.

> Q. Okay. What did Mr. Carr do when he came down and went to that fish camp with that computer,

what did he do?

A. He helped us get the system running.

Q. By help you mean the system running, can you be more specific? What did he do?

A. *I don't know* whether the software was downloaded at the fish camp or whether—excuse me—whether it was entered into the computer at the fish camp *I don't know. These guys are yakking a hundred miles an hour on stuff I don't understand, so I'm not even sure exactly specifically what they were doing.*

Q. Okay.

A. My main concern was that the system worked and it worked. You know, it's like a mechanic fixes your car, you know. You're not exactly sure what he's doing, in some case, but if it's running when he's through, then you know he's fixed it.

Q. Okay. What did you see Mr. Carr do with regard to that computer?

A. Okay. I saw him, you know, working on the computer.

Q. Jeff Carr?

A. Yeah. I'm trying to picture it in my mind, but I can't quite draw the picture of, you know, him actually—yeah, I—okay. It was in the entrance of the fish camp where he was working on the computer, yeah.

Q.. Okay. Who got the compuer node running?

A. Well, Jeff and Bill did.

Q. Okay. After they got it running—let's leave the fish camp—tell us what happened.
Ibid. 47-48. (Emphasis added.)

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Q. Okay. Did you ever, to the best of your memory, have any conversations with Jeff Carr regarding using these VMS devices for txt or advertising?

A. No. *Oh, wait a minute. I take that back. Yes.*

Q. Okay. Can you tell us—

A. Sure.

Q. —about this conversation?

A. *He told me how they would work for advertising.*

Q. Okay. Go ahead.

A. He said, I think, you know he said that if a dealer wanted to they could goto the local pizza store and when the pizza store wa having a special, he could download it, you coulddownload that information to the customers.

Q. Okay. Why would—why did you not participate in that?

A. Because that's not what we were trying to do. We weren't interested in a pizza store business. We were interested in keeping our customers up and running.

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MR. THOMPSON: One second.

BY MR. THOMPSON:

Q. Did there come a point where you talked to Jeff Carr about something he may have done in Canada?

A. You have to be a little bit more specific than that.

Q. Okay. Did anyone ever tell you who wrote the software to set this entire system up?

A. *You mean just come right out and say it? No.*

Q. No. What I'm asking is do you know—did Jeff Carr ever discuss with you who made the software for the system and who put it and who worked with it in Canada?

A. *Not really.* You know, just from the general conversations, you know, I had between him and Bill, you know, *I assume that Jeff wrote the software.*

Q. Okay.

A. But he never came out and said, "I wrote the software for this." He never came out and said that to me.

Q. Okay. Are you—do you have knowledge or are you aware of who actually put the software in the computer in Canada?

[Objection and discussion deleted.]

BY MR. THOMPSON:

Q. Did Jeff Carr discuss with you who loaded the software into the Canadian computer?

A. *No. Ibid.* pp. 49-52 (Emphasis added)

The defense believes that a lot of the confusion emanates from the technical nature of the evidence, which is a prime reason why oral argument would be of assistance. For example, the Court states on page 6 of its decision that it was of the opinion that Mr. Carr "installed" the wizard codes in Mr. Hoban's computer. That is not correct. The exact same computer would be set up the exact same way whether it was going to be a host for a text delivery system or for illegal reception of wizard codes, or both. The evicence was uncontroverted that it was Ronald McDonald in Canada that had the wizard codes on his computer and those who would pay to be on his "bulletin board" could download the wizard codes into their computers. The codes constantly changed and could not be "installed".

The same host computer could be used for receiving and delivering wizard codes as well as delivery of text. The only thing that distinguished the VMS device when it was used illegally was to change the Eprom so that the software would descramble satellite signals rather than deliver text. While the changing of software was a major modification to the

system it was easily accomplished. The user simply removed the legal Eprom and replaced it with the illegal one that had the software sold by Ron McDonald. As the government said in its brief the procedure is as easy as changing a light bulb. The distinction is important because apparently the Court evisions the witnesses as having seen Mr. Carr performing some activity, or giving others information on how to perform an activity, which was inherently indicative of illegal conduct. That is not so. His actions and advice would be exactly the same whether a person was setting up a system to use it for illegal purposes, legal purposes, or a combination of the two. As previously noted no one needed his assistance to change the Eprom.

In short, the evidence against Mr. Carr was a long way from being "overwhelming". It was close at best. The only evidence that Mr. Carr was engaged in illegal activities were the statements that he made to the undercover agent who had supposedly cloned the VC-II Plus. This Court noted in its decision that Mr. Carr had stated to a witness that he had "travelled to Canada to obtain the wizard codes". That witness was the undercover agent and Mr. Carr's explanation as to why he lied[2] under those circumstances was quite reasonable. While the jury was of course free to reject that explanation it would have been every bit as reasonable for

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[2] The panel noted on pages 11 and 12 of its decision that the evidence showed that 39,000 VMS devices were intended for sale. That figure was based upon the number of computer chip grids that had been ordered from the manufacturer by VMS to be used in its devices. The record is therefore uncontroverted that Mr. Carr and Mr. Mayes were lying to undercover agent Coleman when they told him that they had "70,000 boards being updated through [their] system." Opinion p. 12. There was ample evidence for the jury to believe that Mr. Carr was lying to the undercover agent so that he could see if the VC-II Plus had been cloned.

them to have accepted it. Given the circumstances under which Mr. Carr made those statements it hardly constitutes compelling evidence of guilt. It is much more likely that the jury was impressed by the same testimony that this Court found so indicative of guilt. That is, the admissions by Mr. Carr that he knew the VMS devices were being modified and used illegally. That brings us to the constitutional issue.

APPENDIX H

U.S. CONST. AMEND XIV, § 1

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

§ 605. Unauthorized publication or use of communications

47 U.S.C. § 605 (e)(4)

(e) Penalities; civil actions; remedies; attorney's fees and costs; computation of damagaes; regulation by State and local authorities.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programing, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisioned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.